Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application Filed for the Acquisition of Certain Assets and Authorizations of CIMCO Communications, Inc. by Comcast Phone, LLC, Comcast Phone of Michigan, LLC, and Comcast Business Communications, LLC	)	WC Docket No. 09-183

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

CITY OF DETROIT, MICHIGAN

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Introduction: CIMCO Communications, Inc. ("CIMCO"), Comcast Phone, LLC ("Comcast Phone"), Comcast Phone of Michigan, LLC ("Comcast-MI") and Comcast Business Communications, LLC (collectively, "Applicants"), have filed an Opposition to Petition for Reconsideration ("Opposition") in response to the City of Detroit's Petition filed in WC Docket No. 09-183. The City of Detroit ("City") hereby provides its Reply to that Opposition and affirms the need for the Commission to reconsider its December 1, 2009 decision released in a Public Notice (FCC 09-104).

Applicants baldly assert that the waiver provisions of Section 652(d) of the Communications Act of 1934, as amended (the "Act") are ambiguous. In fact, the statute quite plainly sets forth a process for waiver, it is just one that the Applicants do not like. The statute plainly says that in addition to the Commission making a determination that "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served," the applicant must establish that "the local franchising authority approves of such waiver." Whether that approval is expressed on a written form provided by the applicant or by the FCC, or is expressed by a filing in the relevant docket, or through some other means is a procedural detail and its absence does not make the statute ambiguous. "Approval" means approval and does not mean "lack of disapproval," nor does it imply a shot-clock.

Applicants complain that following the statutory requirement and seeking approval from each local franchising authority ("LFA") would cause delays and uncertainty. They go so far as to disingenuously assert that forcing them to do what Congress plainly requires in the statute "would be directly contrary to Congressional intent." Setting aside their Through the Looking Glass view of Congressional intent, Applicants are mistaken when they assert that there is relevant precedent allowing the Commission to re-interpret plain statutory language.

Applicants' Comparisons Inapplicable: The approval language in Section 222 of the Act, to which Applicants look for an analogue, is a dissimilar provision. The Commission was able to provide an "opt-out" option as a form of "approval" in the Section 222 context only because of a pre-existing customer-carrier relationship, as part of which the customer was inferred to have given approval for the carrier's use of personal information. *See U.S. West v FCC*, 182 F.3d 1224 (C.A. 10, 1999), and *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860 (2002). No such analogous relationship exists under Section 652, where LFAs have no relationship with any the parties to the buyout that can reasonably be inferred to provide approval of a waiver of Section 652's prohibition on buyouts.

Section 617 Supports City: When Congress intends to include a time limit and a "deemed granted" limitation on LFA approval authority, it does so explicitly. One such example is in Section 617 of the Act, which limits LFAs to 120 days to act to approve a cable system sale or transfer, and provides that if no final decision is rendered within 120 days, then the request for approval shall be deemed granted. *See* 47 U.S.C. § 537. But no such limitations were imposed by Congress in Section 652 (and the lack of them does not make that section ambiguous).

The contrast between Sections 617 and 652 shows that when Congress intends there to be a time limit in which to act, with inaction leading to approval, it says so quite directly. This contrast between the two sections is reinforced by the fact that both address acquisitions by cable companies. Section 617 addresses changes of control of cable companies, which when added by Congress in 1992 almost always involved major cable companies such as Comcast, Time Warner and Cox acquiring smaller cable companies as the cable industry consolidated from thousands of small operators (each serving one or two municipalities) into an industry dominated by a few major system operators (MSO's). Section 652 addresses cable companies acquiring phone companies, or vice versa. It is thus the more telling that four years after adding the "shot clock" provisions of Section 617, Congress chose to add Section 652 with no "shot clock" provision. What Applicants are seeking is a change in the statute, and the venue for that is the Congress, to whom Applicants' complaints and policy arguments should be addressed, not this Commission.

Applicants are here seeking Commission assistance in making it easy for them to meet the prohibition waiver requirements. However, Section 652 in unequivocal language both (1) establishes a clear policy prohibiting the type of transaction Applicants are here seeking to complete and (2) requires local approval (as well as Commission approval) to overcome that prohibition. While Applicants may be understandably unhappy with this Congressional policy, that does not make the statute ambiguous and does not provide the Commission with the authority to make the process of achieving a waiver easier. The structure of Section 652 clearly disfavors what Applicants here are intending by providing a general prohibition and allowing for waivers of that prohibition only when certain criteria are met. In the context of the statute, a waiver is meant to be an exceptional circumstance. Whether or not that is now viewed as a wise policy choice is up to Congress to determine, not the Commission.

To repeat: If Applicants wish to change the requirements of Section 652 so that the burden is on the LFA to step in and object to prevent a buyout, as opposed to the burden being on the applicants to reach out to the LFA and obtain its approval, then such a change must be sought and obtained from Congress and not from the Commission.

Grounds for LFA Review: Finally, Applicants' efforts to constrain the grounds on which LFAs may grant or withhold their approval flies in the face of the statutory language. The provisions of Section 652(d)(6) clearly set forth two requirements for the grant of a waiver: 1) a Commission determination in accord with one of the grounds under Section 652(6)(A), and 2) "the local franchising authority approves of such waiver." 47 U.S.C. § 572(d)(6)(B). Congress could clearly have said in 652(d)(6)(B) that such LFA approval must be made on the same basis as the Commission determination under 652(d)(6)(A). But it did not do so.

Viewed in context, the policy choice by Congress to have LFAs and the Commission evaluate waiver requests on different grounds makes sense. LFAs have real, on-the-ground experience with the applicants – often lengthy experience – which can be useful in determining whether or not the proposed transaction should be approved and will "meet[] the convenience and needs of the community," as well as whether or not the applicants have a history of meeting their public interest obligations. 47 U.S.C. § 572(d)(6)(A)(iii). Part of the value that LFAs bring to the waiver review process is that body of experience with the applicants, a value captured in the proverbial expression, "past is prelude." The Applicants here would hobble LFAs' contributions to the waiver process by limiting their considerations only to the single transaction at hand. Congress never intended the waiver review process to unfold with such blinders in place - - that is the reason why LFA approval is required.

And accepting Applicants' position, and limiting LFAs to the same review criteria that the Commission must use in its determination, would result in no net benefit from LFA participation in the process, but would merely lead to duplication of effort by local and federal governments.

Congress did <u>not</u> create such a duplicative and wasteful review procedure. Instead it carefully specified different roles for the Commission and LFAs in reviewing merger requests under Section 652:

> The conferees also provided for the establishment of a waiver process of the statutory rules. In new section 652(d)(6), the conferees <u>give specific guidance to the Commission with respect to granting waivers</u>. In that regard, the conferees <u>allow the Commission to waive</u> the various restrictions in this section <u>if</u>: the cable company or telephone company <u>would be subjected to</u> undue economic stress, the cable system or local exchange facilities <u>would not be</u> economically viable, the anticompetitive effects of the proposed transaction <u>are clearly outweighed by</u> the public interest, and <u>the local franchising authority approves</u> of such waiver.

Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference, HR-104-458, 104th Cong., 2d Sess. at 175 ("*Conference Committee Report*") (emphasis added). As set forth in the *Conference Committee Report*, Congress gave "specific guidance to the Commission" on what the Commission was to consider in granting waivers. The underlined phrases above illustrate the separate roles of the Commission and the LFAs, how Congress intended that the FCC's determinations be forward-focused on the likely anticompetitive results of the proposed transaction, while the LFA approval authority has no such limits. The grounds for LFA review could thus be broader and include other relevant factors, especially those which might not easily be known to or come to the attention of the Commission.[1]

LFAs being served by a cable company and its proposed acquiree are in a better position than the Commission to evaluate many aspects of the two companies. For example:

- Does the cable company have a history of poor or abusive behavior, ignoring state and local laws, not complying with franchise terms, or engaging in behavior that leads to numerous complaints (from customers, contractors, or others whom the company has harmed or treated poorly)?
- Or is the situation reversed, where the phone company to be acquired is a "bad actor" and the cable company might play the role of a "white knight," perhaps leading to improvements in local service?
- As to right of way matters (an item of significant importance to municipalities), what is the history of the two companies in terms of complying with local law and practice to ensure (for example) that the streets are not unduly dug up, or that if dug up, are fully and promptly restored so as not to obstruct traffic and harm local businesses and residents?
- More generally, both the cable and phone companies are often in many respects "tenants" using public property (*i.e.*, the rights of way) which municipalities over centuries have acquired, improved and maintained at large expense. The municipality would be derelict in its "landlord" type responsibilities as to the rights of way if it

[1] This would be comparable to LFA approval of cable franchise transfers (technically changes in control of a cable company) when one cable company acquires another one, where such approval in a cable franchise is not conditioned, or is only broadly conditioned, *e.g.* - - with the most typical franchise language being that approval "will not unreasonably be withheld." *See* 47 U.S.C. § 537.

allowed an unruly or disruptive tenant to expand the property being leased, or if it did so without obtaining additional protections (bonds, liquidated damages) to better assure good behavior and provide prompt redress if such does not occur.[2]

The preceding examples are merely illustrative. Others could be added, but it is not necessary to do so, because Congress was specific: In Section 652 it said that "The Commission may waive the restrictions [prohibiting cable/phone acquisitions] *only if* . . . the local franchising authority approves of such waiver." It did not limit the grounds for local approval.

Comcast's History Belies its Arguments: Applicants' make arguments that allowing local approval of buyout waivers on broad grounds and without a shot clock will effectively prevent any such transactions, but this position is squarely belied by Comcast's own corporate history: Comcast has grown for decades through serial acquisitions of cable companies, most of which required individual LFA approval and many of which predated the shot clock provision added to Section 617 by Congress in 1992. As is well known, Comcast originated in 1963 as a cable company in Tupelo, Mississippi, serving 1,200 subscribers. Today, the company boasts 23.8 million cable customers. *See* http://www.comcast.com/corporate/about/pressroom/corporateoverview/corporateoverview.html (accessed January 15, 2010). Comcast's own corporate timeline demonstrates that over the decades Comcast bought up literally thousands of other cable companies, to end up today as the largest cable company in the U.S., if not the world. *See* http://www.comcast.com/corporate/about/pressroom/corporateoverview/comcasttimeline/comcasttimeline.html (accessed January 15, 2010). Such acquisitions in most cases required the approval of each of the LFAs being served, due to local franchise provisions prohibiting a

[2] As in the landlord–tenant context, it is no response to say that a landlord has redress through the courts - - and that therefore a bad tenant should be allowed to expand the property being leased. The courts are not an adequate remedy for bad behavior. Market-based remedies (such as refusing to extend a lease until bad behavior is corrected) are a more effective solution.

change in control of the local cable company without prior LFA approval. Nevertheless, all of Comcast's acquisitions prior to 1992 were accomplished without the kinds of "shot clock" or other limits on LFA approval that Applicants are seeking to impose here.

To be blunt, Comcast grew at an astonishing rate via cable company acquisitions both before and after Congress added a shot clock in 1992. Comcast's policy arguments that the Congressional scheme set forth in Section 652 would lead to insurmountable burdens is thus incorrect, wholly apart from the fact that such complaints have to be addressed to Congress, not to this Commission.

Conclusion: For the reasons stated above, and in the City's Petition, the City of Detroit, Michigan respectfully requests that the Commission reconsider its determination with respect to the standard for LFA approval, and requests that the Commission require Comcast and CIMCO to obtain actual approval of a waiver from LFAs as set forth in the Act. The City furthermore respectfully requests that the Commission reconsider its determination to limit the basis for LFA approval or disapproval, and that it provide no such limits on the basis for approval/disapproval beyond the limits set forth in 47 U.S.C. § 572(d)(6)(B).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2010, I caused a true and correct copy of the foregoing Opposition to Petition for Reconsideration to be mailed by first class U.S. mail and electronic mail to:

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